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Supreme Court Seems Split Over Case That Could Transform Federal Elections

The justices are considering whether to adopt the "independent state legislature theory," which could give state lawmakers nearly unchecked power over federal elections.

By Adam Liptak

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WASHINGTON — The Supreme Court seemed splintered on Wednesday about whether to adopt a legal theory that would radically reshape how federal elections are conducted. The theory would give state legislatures enormous and largely unchecked power to set all sorts of election rules, notably by drawing congressional maps warped by partisan gerrymandering.

The justices' questioning over three hours of arguments suggested that they were roughly divided into three camps. The three most conservative justices appeared prepared to embrace an expansive version of the theory, while the three liberal justices were adamant that it should be rejected.

The remaining members of the court — Chief Justice John G. Roberts Jr. and Justices Brett M. Kavanaugh and Amy Coney Barrett — seemed to be searching for a compromise under which state supreme courts would generally have the last word on disputes over state laws governing federal elections but be subject to oversight from federal courts in rare cases.

The case concerned the "independent state legislature" theory, which is based on a reading of the Constitution's Elections Clause, which says, "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof."

Proponents of the strongest form of the theory say this means that no other organ of state government can alter a legislature's actions on federal elections. The arguments focused on whether state supreme courts can reject state laws on federal elections under their constitutions.

David H. Thompson, a lawyer for state lawmakers in North Carolina, said the theory means that the state's Supreme Court should not be permitted to reject a congressional voting map drawn by the Legislature because it was a partisan gerrymander that violated the state Constitution.

Justice Elena Kagan said that position had "big consequences."

"It would say that if a legislature engages in the most extreme form of gerrymandering, there is no state constitutional remedy for that," she said, adding: "It would say that the legislature could enact all manner of restrictions on voting, get rid of all kinds of voter protections that the state Constitution in fact prohibits."

"This is a proposal," she said, "that gets rid of the normal checks and balances."

Mr. Thompson responded that Congress and federal courts remained free to act.

Justice Samuel A. Alito Jr. suggested that it may be dangerous to entrust state judges, many of whom are elected, with the task of assessing the constitutionality of voting maps.

"Do you think," he asked, "that it furthers democracy to transfer the political controversy about districting from the legislature to elected supreme courts where the candidates are permitted by state law to campaign on the issue of districting?"

The case argued Wednesday, Moore v. Harper, No. 21-1271, concerns a voting map drawn by the North Carolina Legislature that was rejected as a partisan gerrymander by the state's Supreme Court. Experts said the map was likely to yield a congressional delegation made up of 10 Republicans and four Democrats.

The state court rejected the argument that it was not entitled to review the actions of the state Legislature, saying that adopting the independent state legislature theory would be "repugnant to the sovereignty of states, the authority of state constitutions and the independence of state courts, and would produce absurd and dangerous consequences."

Republicans seeking to restore the legislative map then asked the U.S. Supreme Court to intervene, arguing in an emergency application in February that the state court had been powerless to act.

The justices rejected the request for immediate intervention in March, and the election in November was conducted under a map drawn by experts appointed by a state court. That resulted in a 14-member congressional delegation that was evenly divided between Republicans and Democrats, roughly mirroring the state's partisan divisions.

The Supreme Court has never endorsed the "independent state legislature" theory, but

four of its conservative members have issued opinions that seemed to take it very seriously.

Three justices said in March that they would have granted the application.

“This case presents an exceptionally important and recurring question of constitutional law,” Justice Alito wrote, joined by Justices Clarence Thomas and Neil M. Gorsuch. “Namely, the extent of a state court’s authority to reject rules adopted by a state legislature for use in conducting federal elections.”

Justice Kavanaugh agreed that the question was important. “The issue is almost certain to keep arising until the court definitively resolves it,” he wrote.

Those statements echoed similar ones in opinions issued in October 2020.

“The provisions of the federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election,” Justice Alito, joined by Justices Gorsuch and Thomas, wrote in a statement in 2020 when the court refused to fast-track review of whether the Pennsylvania Supreme Court could alter deadlines for mail ballots set by the Legislature.

Along the same lines, Justice Gorsuch, joined by Justice Kavanaugh, wrote in a concurring opinion that “the Constitution provides that state legislatures — not federal judges, not state judges, not state governors, not other state officials — bear primary responsibility for setting election rules.”

The Supreme Court agreed in June to hear the North Carolina case on the merits.

At the argument on Wednesday, Justice Kagan noted that some of the court’s precedents seemed to undermine the independent state legislature theory.

When the court closed the doors of federal courts to claims of partisan gerrymandering in Rucho v. Common Cause in 2019, Chief Justice Roberts, writing for the five most conservative members of the court, said state courts could continue to hear such cases — including in the context of congressional redistricting.

“Our conclusion does not condone excessive partisan gerrymandering,” he wrote. “Nor does our conclusion condemn complaints about districting to echo into a void. The states, for example, are actively addressing the issue on a number of fronts.”

Seeming to anticipate and reject the independent state legislature theory, he wrote that "provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."

In 2015, in Arizona State Legislature v. Arizona Independent Redistricting Commission, the court ruled that Arizona's voters were entitled to try to make the process of drawing congressional district lines less partisan by creating an independent redistricting commission despite the reference to "legislature" in the Elections Clause.

"Nothing in that clause instructs, nor has this court ever held, that a state legislature may prescribe regulations on the time, place and manner of holding federal elections in defiance of provisions of the state's constitution," Justice Ruth Bader Ginsburg, who died in 2020, wrote in the majority opinion of the 5-to-4 decision.

The balance of power on the court has shifted since then. Justice Barrett, who filled the seat previously held by Justice Ginsburg, may now hold the decisive vote.

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